

FILED

JUN 1 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALFREDO VIRGEN-ZARATE,

Defendant - Appellant.

No. 05-10230

D.C. No. CR-04-20042-RMW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted April 5, 2006
San Francisco, California

Before: SILER^{**}, RAWLINSON, and BYBEE, Circuit Judges.

1. We reject Virgen-Zarate's equal protection claim arising from the alleged disparate treatment under U.S.S.G. § 2L1.2 as compared with U.S.S.G. § 2K2.1, because Virgen-Zarate cannot show that he has been "intentionally treated

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (citation omitted).

2. We do not reach the merits of Virgen-Zarate’s sentencing claim because we lack jurisdiction to review the district court’s discretionary denial of a request for downward departure. *See United States v. Romero*, 293 F.3d 1120, 1126 (9th Cir. 2002).

AFFIRMED in part and DISMISSED in part.